view was denied, and this Court did not bring up the record before the Public Utilities Commission. The question is whether this limited procedure in California can restrict the record to be placed before the Supreme Court of the United States and if the procedural limitations provided for in the California statutes can restrict the review of the Supreme Court of the United States.

II

THE DECISION OF THIS COURT IN DENYING A PETITION FOR A WRIT OF MANDATE IS DIRECTLY CONTRARY TO THE HOLDING OF THE SUPREME COURT OF THE UNITED STATES.

The subject matter of the Petition for a Writ of Mandate involved a Petition for a Writ of Review (SF No. 21861) from the Public Utilities Commission decision (case 7907) wherein this Court did not bring up the record (Sec. 1756 Public Utilities Code). Petitioner has appealed to the Supreme Court of the United States. (See Notice of Appeal, Appendix B, to Petition for Writ of Mandate and Notice of Appeal filed in S.F. No. 21861). The Public Utilities Commission will not certify the record in its custody for transmission to the Supreme Court of the United States, and this court in denying a Petition for Writ of Mandate to require the certification of the record in the custody of the Public Utilities Commission for transmission to the Supreme Court of the United States give as a reason in this Court's decision of September 15, 1965 (Exhibit A hereto):

> "The Public Utilities Commission record was not before us in our consideration and disposition of the proceeding for review. . . ."

See also on this subject the Order of Mr. Justice Harlan of the Supreme Court of the United States of September 17, 1965, granting additional time for docketing the case, attached hereto as Exhibit B.

The same position taken by this court was taken by the Supreme Court of the State of Illinois and the Supreme Court of the United States held such position was without merit. The Supreme Court of the United States ordered the Supreme Court of the State of Illinois to procure and bring up the record that was in the custody of another body and which record had not been before the Supreme Court of Illinois.

The action of the Supreme Court of the United States in directing the Supreme Court of the State of Illinois to bring up the portion of the record not in its custody is mentioned in *Re Summers* 323 US 705 (1944), and described in *Re Summers* 324 US 561, 567 (1945):

> "Our rule on the petition for certiorari required the Supreme Court of Illinois to show cause why a record should not be certified and the writ of certiorari granted."

and then the Court in *Re Summers* 325 US 561, 563 (1945) footnote 2, reviewed the matter and pointed out its holding as follows;

> "[2]The petition for certiorari was not accompanied by a certified record. Rule 38(1). It alleged an inability to obtain a record from the Clerk of the Supreme Court of Illinois because the documents were not in that official's custody. See note 8, infra. No opposing brief was filed. After the expiration of the time for opposing briefs, rule 38(3), a rule issued 'returnable within 30 days, requiring the Su-

preme Court of Illinois to show cause why the record in this proceeding should not be certified to this Court and also why the petition for writ of certiorari herein should not be granted.' Journal, Supreme Court of the United States, October Term, 1944, p. 6. A return was duly made by the Chief Justice and the Associate Justices of the Supreme Court of Illinois which stated the position of the justices on the certification of the supposed and alleged record and their opposition to the granting of the certiorari. On consideration our writ of certiorari issued, directed to the Honorable, the Judges of the Supreme Court of Illinois, commanding that 'the record and or papers and proceedings' be sent to this Court for review. Journal, Supreme Court of the United States, October Term, 1944, p. 93. The papers comprising the proceedings before the Supreme Court of Illinois were certified to us by the Clerk of that court."

The authoritative text entitled "Supreme Court Practice" by Stern and Gressman, Third Edition (1962) carefully points out that in some state court cases, the record may not be, and may never have been possessed by the court whose judgment is under attack, yet that record must be brought up:

"The task of ordering and obtaining the certified record is one to be performed exclusively by counsel for the petitioner. The Court will not, by writ or otherwise, assist in that task except in unusual circumstances, as where the lower court refuses to supply counsel with the record. In *re Summers*, 325 U.S. 561, 562, n.2. Usually, the record is to be found in the lower court whose judg-

ment is the subject of the petition, as is almost invariably true in cases coming from the federal courts. But in some state court cases, the record may not be, and may never have been, possessed by the court whose judgment is under attack. Counsel for petitioner must then ascertain where the record is and have it certified by the clerk of whatever lower court then has it. In some states, the record may have been divided among several courts; the various portions thus must be certified by and obtained from the clerks of the respective courts possessing those portions". (p. 242)

III

NO ACTION, INACTION OR PROCEDURAL LIMITATION OF OR ON THE SUPREME COURT OF THE STATE OF CALIFORNIA, CAN LIMIT THE REVIEW OF THE SUPREME COURT OF THE UNITED STATES

The appeal of petitioner Northwestern Pacific Railroad Company to the Supreme Court of the United States involves federal constitutional issues. (See Notice of Appeal, Appendix B, to Petition for Writ of Mandate, and Notice of Appeal on file in S.F. No. 21861). The review of the California Supreme Court of the Public Utilities Commission where federal constitutional issues are raised is provided for in Section 1760 of the Public Utilities Code as follows:

"Sec. 1760. When Supreme Court to exercise independent judgment on law and facts. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of

> the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

The record before the Public Utilities Commission is described in Sections 1706, 1756 and 1757 of the Public Utilities Code.

Petitioner Northwestern Pacific Railroad Company filed its Petition for Writ of Review (raising federal questions) S.F. No. 21861, in the Supreme Court of the State of California seeking a review of Public Utilities Commission's Case No. 7907, as provided for in section 1756 of the Public Utilities Code of California (Calif. Stat. 1963, ch. 461, p. 1310, Sec. 6).

Petitioner's Petition for Writ of Review, S.F. No. 21861, and the accompanying papers addressed to the Supreme Court of the State of California are replete with references to, and quotes from, the transcript and exhibits from the Public Utilities Commission's proceedings.

This California statute (Sec. 1756, Public Utilities Code) provides that the Supreme Court of the State of California shall direct the Public Utilities Commission to certify and bring up its record only under the following circumstances:

> "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the orig-

inal order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

The Supreme Court of the State of California, by its order denying the Petition for Writ of Review in S.F. No. 21861 dated March 10, 1965, denied a Writ of Review (and on May 7, 1965, denied a Petition for Rehearing). The Supreme Court of the State of California did not direct the Public Utilities Commission to certify and bring up the record that had been before the Public Utilities Commission.

There were no statutory or rule provisions whereby petitioner could take steps to bring up a properly certified record for this court's consideration other than pray such be done in the Petition for a Writ of Review (which was done) and this Court did not bring up the record although this Court was required to exercise an independent judgment on the facts. (Sec. 1760, Public Utilities Code). It is submitted no procedural limitation as here on bringing up the record can limit the review of the Supreme Court of the United States on federal constitutional issues.

The appeal of petitioner to the Supreme Court of the United States (See Notice of Appeal, Appendix B to Petition for a Writ of Mandate and Notice of Appeal on file in S.F. No. 21861) was taken pursuant to 28 USC 1257 (2) as follows:

"Final judgment or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows: . . . '2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

The question is whether the Supreme Court of the State of California can limit the review of the Supreme Court of the United States by excluding the record made before the Public Utilities Commission. The answer, of course, is that the Supreme Court of the United States will look to the whole record, not the limited record before the Supreme Court of the State of California wherein the Supreme Court of the State of California did not bring up the record of the Public Utilities Commission.

The following decisions sustain the jurisdiction of the Supreme Court to review the order of the California Public Utilities Commission by appeal in this case: *Atchison, T. & S.F.Ry. v. Public Util. Comm'n.*, 346 US 348 (1953); *Schroeder v. City of New York*, 371 U.S. 208 (1962).

The court has spoken very clearly that the substantive rights of a party cannot be limited by procedure or local practice in *Brown v. Western Railway of Alabama*, 338 US 294, 296 (1949). The court carefully analyzed the problem and stated a federal right (review of the constitutional questions) cannot be defeated by the forms of local practice:

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from

'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure.' To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Vermont R. Co. v. White, 238 US 507, 59 L ed 1433, 35 S Ct 865, Ann Cas 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.' Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See American R. Exp. Co. v. Levee, 263 US 19, 21, 68 L ed 140, 143, 44 S Ct 11. And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it. First Nat. Bank v. Anderson, 269 US 341, 346, 70 L ed 295, 302, 46 S Ct 135; Davis v. Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13; Covington & L. Turnpike Road Co. v. Sandford, 164 US 578, 595, 596, 41 L ed 560, 566, 17 S Ct 198. This rule applies to FELA cases no less than to other types. Reynolds v. Atlantic C.L.R.Co. 336 US 207, 93 L ed 618, 69 S Ct 507; Anderson v. Atchison, T. & S.F.R.Co. 333 US 821, 92 L ed 1108, 68 S Ct 854; cf Lillie v. Thompson, 332 US 459, 92 L ed 73, 68 S Ct 140."

Numerous cases hold the Supreme Court of the United States, where federal constitutional deprivations are alleged, will reexamine the evidentiary basis and make an independent examination of the evidence. Some of the cases are cited below.

In *New York Times Co. v. Sullivan,* 376 US 254, 285 (1964), the court said:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

In *Napue v. Illinois,* 360 US 264, 271 (1959) the court said:

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter (US) 1 Whest 304, 4 L ed 97; Cooper v. Aaron, 358 US 1, 3 L 2d 2d 5, 78 S Ct 1401. This principle was well stated in Niemotko v. Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325, 328:
>
> " 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.' "

In *Edwards v. South Carolina,* 372 US 229, 235 (1963) it was contended the appellants had been denied the element of due process of law:

> "But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record. Blackburn v. Alabama, 361 US 199, 205, note 5, 4 L ed 2d 242, 247, 80 S Ct 274; Pennekamp v. Florida, 328 US 331, 335, 90 L ed 1295, 1297, 66 S Ct 1029; Fiske v. Kansas, 274 US 380, 385, 386, 71 L ed 1108, 1110, 1111, 47 S Ct. 655."

In *Kern-Limerick Inc. v. Scurlock,* 347 US 110, 121 (1954) the court said:

> ". . . the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."

In *Niemotko v. Maryland,* 340 US 268, 271 (1951) the court said:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded. See Feiner v. New York, decided this day, 340 US 315, post, 295, 71 Ct 303, 328."

In *Feiner v. New York,* 340 US 315, 316 (1951) the court said:

> "In the review of state decisions where First Amendment rights are drawn in question, we of course make an examination of the evidence to ascertain independently whether the right has been violated."

The matter again was well stated in *Local No. 438 v. Curry,* 371 US 542, 551 (1963):

> "The Georgia court's denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment. This Court looked to the whole record, as we are entitled to do in determining questions of finality."

and in *Local Union No. 10 A.F. of L. v. Graham,* 345 US 192, 197 (1953) where it was contended a statute was unconstitutional:

> "In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence.[4]".

and in support thereof in footnote 4, stated:

> "4 '. . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. . . .
>
> "'. . . We have not only his (the master's) findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked.' Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 US 287, 293, 294, 85 L ed 836, 841, 842, 61 S Ct 552, 132 ALR 1200."

The authoritative text entitled Supreme Court Practice by Stern and Gressman, Third Edition (1962) gives another very practical approach to the problem:

> "As has been stated, the notice of appeal contains the appellant's designation of the parts of the record to be certified by the clerk of the lower court to the Supreme Court. The appellant should designate not only those portions of the record he thinks may be useful to him, but all that will be necessary to give the Court an understanding of the questions presented." (p. 274).

It is to be remembered the appeal in question is taken pursuant to section 1257(2) of the *U.S. Judicial Code,* (28 U.S.C. 1257(2)), wherein there is drawn in question the validity of the order of the Public Utilities Commission as relates to the federal constitutional issues.

Thus, the evidence and record before the Public Utilities Commission is essential to determine its validity (Sec. 1760 Public Utilities Code). Of course, one ground of error is that the Supreme Court of the State of California did not grant the Petition for Writ of Review and did not bring up the record as provided for in sections 1756, 1757, 1760 and 1706 of the Public Utilities Code. The Supreme Court of the United States (where as here, federal constitutional issues are involved —See Petition for Writ of Mandate, Appendix B, pp. 3-8 thereof) will examine all the evidence to ascertain independently whether federal constitutional rights have been violated. (See cases cited above). Thus, the Cali-

fornia Supreme Court cannot properly refuse to transmit or order transmitted a certified copy of the recod before the Public Utilities Commission to the Supreme Court of the United States by saying there was no procedure to bring up the record to it, or this court had not brought up the record, or the record was not before this court, since a substantive right is involved, that is, a review of all the evidence by the Supreme Court of the United States to determine federal constitutional issues. (*Brown v. Western Railway of Alabama,* 338 US 294, 296 (1949).

CONCLUSION

It is submitted that the petition for rehearing should be granted and such is essential to the proper determination of the issues presented herein.

Respectfully submitted,

/s/ Randolph Karr,
Randolph Karr, Attorney for
Petitioner Northwestern Pacific
Railroad Company

EXHIBIT A

In the Supreme Court of the State of California, in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission, etc. S.F. No. 21861, S.F. No. 22132.

Filed Sept. 15, 1965.

The motion to enlarge time for docketing appeal in the United States Supreme Court and the petition for writ of mandate are denied for the reasons that the Public Utilities Commission record was not before us in our consideration and disposition of the proceeding for review and that any application for an order that would serve to extend the stay order of June 2, 1965, issued by Associate Justice Douglas of the Supreme Court of the United States, may more appropriately be directed to that court or a justice thereof.

Traynor
Chief Justice

EXHIBIT B

Supreme Court of the United States. No. ....., October Term, 1965.

Northwestern Pacific Railroad Company, Appellant, v. Public Utilities Commission of the State of California.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant, and of the opposition of the appellee thereto,

IT IS ORDERED that the time for docketing the case in the above-captioned cause be, and the same is hereby, extended to and including October 16, 1965.

John M. Harlan
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of September, 1965.

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